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AERONAUTICAL USE OF THE AIR*

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Another element, the air, has so recently come under man's control for purposes of motivation that constant lookout is needed to steer mental concepts into ways constructively utilizing the modern mechanism of aeronautics. Public opinion about aviation today is largely formed by complicated political and economic situations and competitive efforts of nations for supremacy in security and defense.¹ Such psychology, rooted in fear of attacks from the air, stimulates warlike activities, from which geographical isolation is no longer proof of immunity. It challenges not only the government of the United States, but every person in the nation.

Principles at stake include the use of force, non-resistance in war, non-military aggression in peace, the political framework of nations together with their economic foundations, and intellectual cooperation for the progress of civilization. Has the acceptance of national sovereignty in the air completely relegated the possibility of freedom of flight in airspace? Is internationalization of civil aviation desirable, and is disarmament a prelude to it and to an international air police force? Modern administration of justice, it is claimed, requires, in addition to the Permanent Court, an International Court of Equity. For this, international law must be examined, as well as the systems of law and legislation established in the various states.

* This article develops the subject of internationalization of aircraft which was briefly mentioned in an earlier article by Margaret Lambie, "Universality Versus Nationality of Aircraft," 5 JOURNAL OF AIR LAW 1, 246 (1934) at pp. 260-262.

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1. See bibliography for suggested reading on details of topics discussed.

INDIVIDUAL RESPONSIBILITY

Aviation becomes an individual responsibility, for the majority's stand on principles involved formulates national policies and international action. An *impasse* as to a principle may indicate need for new lines of thought, distinguishing between possible fault in the principle itself or its administration.

How free is an individual to choose? We are told that civil aviation does not really exist in Europe today.

"The civilian populations may use the aeroplane only when and in what manner the general staffs of Europe see fit to permit.

"Civil aeroplanes only fly those routes which imperialist interests permit or desire, and their normal and natural design is cramped and warped by regulations based upon the needs of future wars, as the first and primary consideration. Consequently, commercial aviation is an anachronism. Unable to pay its way, owing to the restrictions placed upon its development, it goes, hat in hand, to the various national governments for subsidies and permission to exist. Those subsidies are given—at a price, the price of its soul.

"If we wish to study the benefits that aviation can bring to commerce we need to look to the United States of America, where a continent is free to develop along normal and useful lines"²

Even in the United States there is not absolute freedom for civil aviation, because the States have legislative regulations and the Federal government controls specifications for aircraft, air routes, licensing of pilots and other important features where interstate matters are concerned. But these regulations and control are for the promotion of the civil as apart from the military aviation.

Upon entering the international field, nations find themselves less and less free as domestic affairs assume more and more an international aspect. The waning of sovereignty has been expressed as follows:

" . . . Plus les relations internationales se développent, moins les peuples sont libres. A chaque progrès de leur solidarité correspond une nouvelle limitation de leur liberté. Pour eux comme pour les individus, civilisation et liberté sont en raison inverse l'un de l'autre . . . les affaires domestiques échappent peu à peu aux compétences exclusives internes pour revêtir un certain caractère international . . . Entendue dans le sens d'un pouvoir omnipotent et inaliénable, qui ferait obstacle au progrès de l'organisation internationale, la souveraineté n'est qu'un souvenir du passé. Entendue dans le seul sens aujourd'hui admissible d'une liberté régie par le droit, elle est susceptible de toutes les limitations imposées par les nécessités de la vie"³

2. Philip S. Mumford, *Humanity, Air Power and War* (1936), pp. 32-33.

3. H. E. Nicolas Politis, "La Souveraineté et la Police Internationale," 1 *New Commonwealth Quarterly* 219-220 (1935).

National sovereignty as an outmoded doctrine is the burden of certain advocates of internationalization of civil aircraft and of an international police air force. Some of them would revive "freedom of the air" which became a lost cause when the Air Navigation Convention was signed in 1919. The practical difficulty is that the Convention and many bi-partite imitations are in force today, and that the war complex has intensified nationalistic feeling to such an extent that the United States, as well as most other nations, has appropriated large sums for military and naval purposes and for air preparedness.

On the other hand, an increasing number of people are decrying defense preparations as following a false line of thought. Some believe in total disarmament, others in gradual reduction of weapons of war, some believe in collective renunciation of war, others believe in emphasizing international cooperation in intellectual fields to bring about a moral disarmament, which in turn is a powerful factor in problems of economic and material disarmament.

Instead of conceiving "freedom" as the international use of the air, according to the early theory of certain jurists who compared the upper air to the high seas, and instead of the present "sovereignty" scheme of national aircraft flying in national airspace with permissive use to foreign aircraft,⁴ "internationalization" of aircraft proposes the plan of aircraft, owned or controlled by an international authority and flying through airspace which would be subject to an international jurisdiction.⁵ Each of these three theories seems to have a major fault which may be briefly stated: in the "freedom" theory, if the upper airspace be subject to no jurisdiction, there would result irresponsibility of nations; in the "sovereignty" theory, the effect of placing responsibility upon nations individually leads to competitive national armament and indifference toward collective action internationally; in the "internationalization" theory, the danger is domination by international authority, especially if entrusted with power to use force.

4. See the following references *re* freedom and sovereignty: *Clement L. Bouvé*, "The Development of International Rules of Conduct in Air Navigation," 1 *Air Law Review* 1 (1930); "Regulation of International Air Navigation Under the Paris Convention," 6 *JOURNAL OF AIR LAW* 299 (1935); *Kenneth W. Colegrove*, "A Survey of International Aviation," 2 *JOURNAL OF AIR LAW* 1 (1931); *Joseph W. English*, "Air Freedom: The Second Battle of the Books," 2 *JOURNAL OF AIR LAW* 356 (1931); *Fred D. Fagg, Jr.*, "The International Air Navigation Conventions and the Commercial Air Navigation Treaties," 2 *So. Cal. L. Rev.* 430 (1929); *Amedeo Giannini*, "La Souveraineté des Etats sur l'Espace Aérien," 15 *Droit Aérien* 1, (1931); *Arnold D. McNair*, "The Beginnings and Growth of Aeronautical Law," 1 *JOURNAL OF AIR LAW* 382 (1930); *Albert Roper*, "Recent Developments in International Aeronautical Law," 1 *JOURNAL OF AIR LAW* 395 (1930); *Brower V. York*, "International Air Law in the American Republics," 3 *JOURNAL OF AIR LAW* 411 (1932).

5. Consult League of Nations documents. See footnote 8. *Edmond Sudre*, "De l'Organisation Internationale de l'Aviation Civile," 1 *Revue Générale de Droit Aérien* 1 (1932).

The above criticism is not unmindful that each theory not only has virtues but also has assets which would help to fit it into the world's needs. Nevertheless, the fact that the three theories and their variations do not appear to have solved the problems of the air perhaps indicates an error in the principles advocated, or a lack of comprehension that aviation, as a new expression of human effort, utilizes aircraft, a new species of machine, in a newly conquered medium, the airspace. The word that best summarizes aviation seems to be "universality."

As instruments expanding man's power, aircraft may be turned into uses, destructive or constructive. The decisions face both people and governments. A citizen, for example, is free to choose within the statutes of his government, as to manufacture, sale and operation of aircraft; his government, although representing a sovereign nation, is not only bound by international law but is frequently influenced by public opinion. The recent shipment of aircraft and supplies to Spain when the neutrality legislation of the United States did not cover civil wars, illustrates the far-reaching ramifications of individual responsibility.

We shall examine some of the steps taken and plans proposed to meet problems arising from the possibility of attack from the air.

COLLECTIVE ACTION

The prevention of war, according to Lord Davies,⁶ involves (1) the creation of machinery for securing international justice; (2) international justice, in turn, is dependent upon disarmament; (3) disarmament cannot be obtained without security; and (4) security cannot be purchased without the establishment of sanctions. These all involve collective action, which implies cooperation through the conference of nations.

(a) **International Justice.** Since international tribunals, the Permanent Court of International Justice and the Permanent Court of Arbitration at The Hague, and many phases of international law have been so well discussed in numerous writings, they will be treated incidentally, but with deference herein, and emphasis placed upon disarmament connected with air problems. Proposals for an International Equity Tribunal are of interest to aeronautical development in that the fundamental object of an international equity jurisdiction is "to find a way how to bridge the eternal cleavage

6. *David Davies, The Problem of the Twentieth Century* (1930), pp. 3, 397-531.

between the existing state of law and the continuous evolution in the life and the mutual relations of the nations."⁷

(b) **Disarmament.** The Conference for the Reduction and Limitation of Armaments which was convened on February 2, 1932, by the League of Nations, cannot be considered apart from a series of events and decisions to which it is closely related.⁸ The obligations accepted under Article 8 of the Covenant of the League in 1919 are as follows:

(1.) The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.

(2.) The Council, taking account of the geographical situation and circumstances of each state, shall formulate plans for such reduction for the consideration and action of the several governments.

(3.) Such plans shall be subject to reconsideration and revision at least every ten years.

(4.) After these plans have been adopted by the several governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

(5.) The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

(6.) The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable to warlike purposes.

In execution of these obligations, the Council, in May, 1920, under Article 9 of the Covenant, formed a Permanent Advisory Commission for military, naval and air questions, a body of technical experts appointed by the members of the Council. The first As-

7. *Wolfgang Friedmann*, "The Contribution of English Equity to the Idea of an International Equity Tribunal," *The New Commonwealth Institute Monographs*, London (1935), p. 2.

Various proposals for an international equity tribunal include making such a court an independent institution or part of the Permanent Court of International Justice or combined in some way with the Council of the League of Nations; having it take jurisdiction over international questions of a political nature; giving to it, temporarily, certain legislative power to formulate international law. It would deal in equity with international relations of governments. The question has been raised as to the advisability of an international tribunal, perhaps in an appellate capacity, for cases involving private international law in disputes between individuals under certain conditions. At present there are often difficulties in executing a foreign judgment obtained in a national court.

8. Notes concerning the Disarmament Conference are chiefly taken from Preliminary Report of the Work of the Conference for the Reduction and Limitation of Armaments, prepared by the President, Arthur Henderson, *Series of League of Nations Publications*, IX. Disarmament, 1936, IX. 3. This report gives detailed references to full Minutes and Documents of the Conference.

sembly of the League, however, meeting in September, 1920, recognized that disarmament was more than a technical question. It accordingly decided that a Temporary Mixed Commission should be appointed composed of accepted authorities on the military, political, social, economic and financial aspects of the subject. The Temporary Mixed Commission worked for four years. Its discussions centered mainly upon the ultimate relationship between disarmament and security, and resulted in the submission to the Assembly in 1923 of a draft Treaty of Mutual Assistance, which was based on the fundamental idea that war as an instrument of aggression must henceforth be regarded as an international crime, and it combined the principle of a general international system of collective security with a system of supplementary defensive agreements or regional pacts between particular nations. The draft Treaty was communicated to the governments, but was not accepted as a satisfactory solution of the problem.

The Assembly in 1924 accordingly abandoned the draft Treaty and framed a more comprehensive plan, the Geneva Protocol of 1924, whereby an attempt was made to create a complete system of compulsory arbitration and resistance, by common action, to acts of aggression. The relationship between security and disarmament was again emphasized, the entry into force of the Protocol being made to depend explicitly on the adoption by a general Disarmament Conference of a plan for the reduction of armaments.

The Protocol was set aside in favor of a partial application of the regional system, which was soon afterwards embodied in the Locarno Treaties signed on October 16, 1925. These Treaties guaranteed the *status quo* as between Belgium and Germany and as between Germany and France and provided for a peaceful settlement of disputes between these countries. Following their signature Germany became a member of the League in 1926.

Meanwhile, the Council, acting in accordance with a resolution adopted by the Assembly in September, 1925, set up a Preparatory Commission for the Disarmament Conference, which, from the spring of 1926, worked under the direction of the Council and submitted to that body in December, 1930, a final report and a draft Convention. The work of the Preparatory Commission was supplemented by technical reports from a Committee of Budgetary Experts and by the report of the Committee of Experts appointed to fix rules for the adoption of a standard horsepower measurement for aeroplane and dirigible engines.

It can hardly be maintained that the necessary technical prep-

arations for the Conference had not been made, but at the Council meeting of January, 1931, several members, particularly France, Italy and the United Kingdom, expressed the opinion that, in order to ensure the success of the Conference, a considerable amount of political preparation was necessary and that active negotiations between the governments on the principal political problems outstanding were essential.

Even had there been adequate political preparation for the work of the Conference, its work could not be of short duration. Important conferences for the reduction and limitation of armaments had been held in the past, such as the Naval Conferences at Washington, 1921-22, Geneva, 1927, London, 1930, and the Conferences at Rome in 1924 and Moscow in 1927. Never before, however, had there been a general effort to achieve disarmament embracing all states and all categories of forces and weapons. The Conference brought together sixty-one states, members and non-members of the League; its discussions were intended to cover the whole field of armaments; it considered cognate subjects, such as the manufacture of arms and trade in arms; last, but not least, it had to deal with the difficult and complex problem of the organization of a collective peace system under the heading of security. The armed forces of a country are considered as the most obvious expression of its sovereignty and independence, and this was the first time in the history of the world that an attempt had been made to place a voluntary limit upon the exercise by nations of their sovereign rights in this particular sphere. An Armaments Truce was arranged in 1931.

Qualitative disarmament was the subject of a Resolution adopted on April 22, 1932, which requested the Air Commission to decide:

- (1.) What are the air armaments whose character is the most specifically offensive?
- (2.) What are the air armaments which are the most efficacious against national defence?
- (3.) What are the air armaments which are the most threatening to civilians?

The Air Commission reported differences due to location of vital centers and state of anti-aircraft defenses in the countries, and pointed out that any qualitative question was closely bound up with quantitative considerations. All air armaments, it said, could be used to some extent for offensive purposes, together with civil aircraft according to the incorporation of the latter into armed forces;

aircraft most efficacious against national defense are those capable of dropping or launching means of warfare of any kind; and all air bombardment is a grave threat to civilians.

(c) **Security; Internationalization of Civil Aviation.** The proposals concerning aviation submitted to the Conference by the delegations during February, 1932, have been summarized as follows:

- (1.) Abolition of military aeroplanes (Germany, Denmark, Sweden, the Hejaz).
- (2.) Abolition of military dirigibles (Union of Soviet Socialist Republics).
- (3.) Abolition of military aviation, combined with the internationalization of civil aviation (Spain).
- (4.) Abolition of aerial bombing (Netherlands).
- (5.) Abolition of bombing aircraft (Austria, Belgium, China, Hungary, Italy, Portugal and Switzerland).
- (6.) Reduction of air armaments to an equal limit for all States, to be attained within ten years (Turkey)..
- (7.) Progressive and proportional reduction of air armaments on the basis of materials existing at a specific date (Union of Soviet Socialist Republics)..
- (8.) Creation of an international air force and placing at the disposal of the League of Nations of military air-machines above a certain tonnage or volume (France).
- (9.) Internationalization of civil air transport under a system to be organized by the League (France).
- (10.) Internationalization of civil aviation (Belgium, Spain).
- (11.) Internationalization or strict international control of civil aviation (Denmark, Sweden).
- (12.) International control of civil aviation (Switzerland, Germany and the Union of Soviet Socialist Republics).
- (13.) Publicity relating to non-military aviation (Union of Soviet Socialist Republics).

Internationalization or control of civil aviation was the topic discussed in the Air Commission from June 14 to 24, 1932. The Spanish memorandum was based on the assumption that, while the intrinsic interests of aviation, still at an experimental stage and needing the financial support of governments, must be adequately safeguarded, aviation activity must at every stage be submitted to some form of control by an international institution; that air material without exception should become international; schemes and estimates for the construction of aircraft should be approved by an international body; aviation pilots and staff should be regarded as international and their military training prohibited; statistics of

the movement of aircraft all over the world should be recorded by an international service.

The French delegation, on June 22, 1932, submitted the following proposals:

- (1.) Absolute prohibition of aerial, chemical, bacterial and incendiary warfare;
- (2.) Prohibition of aerial bombardment, apart from the field of battle or air bases and long-range artillery emplacements;
- (3.) Fixing of a maximum tonnage per unit of unladen weight for military aeroplanes, limitation of the number of military aeroplanes in excess of this tonnage essential for defensive purposes and the placing of these machines at the disposal of the League;
- (4.) Continental internationalization of commercial transport aviation;
- (5.) Fixing on a similar basis of maximum tonnage per unit for non-internationalized civil aeroplanes;
- (6.) Corresponding measures concerning the trade in arms and the private manufacture of arms.

President Hoover, on June 22, 1932, submitted proposals, the general principles of which were as follows:

- (1.) The Briand-Kellogg Pact meant that the nations of the world had agreed that they would use their arms solely for defence;
- (2.) The reduction of armaments should be carried out by increasing the comparative power of defence through decreases in the power of attack;
- (3.) The existing relativity as between the armaments of the world, which had grown up in mutual relation to one another, should be preserved in making reductions;
- (4.) The reductions must be real and positive and effect economic relief;
- (5.) The problems of land forces, air forces and naval forces were interconnected and the proposals submitted should not be dissociated one from another.

On the basis of these principles, the United States delegation proposed that the arms of the world should be reduced by nearly one-third. In regard to land forces, the proposal involved the abolition of all tanks, of chemical warfare and of large mobile guns. In regard to effectives, there should be a reduction of one-third in strength of all land arms over and above the so-called "police component," or strength necessary for the maintenance of internal order. In regard to air forces, all bombing-planes should be abolished and a total prohibition of all bombardment from the air enforced. In regard to naval forces, it was proposed that the treaty number and tonnage of battleships should be reduced by one-third; that the treaty tonnage of aircraft-carriers, cruisers and destroyers should be reduced by one-fourth; that the treaty tonnage of sub-

marines should be reduced by one-third and that no nation should retain a submarine tonnage greater than 35,000 tons.

The first phase of the Conference concluded with a Resolution adopted by the General Commission on July 23, 1932, which contained the following references to air forces:

The Conference, deeply impressed with the danger overhanging civilization from bombardment from the air in the event of future conflict, and determined to take all practicable measures to provide against this danger, records at this stage of its work the following conclusions:

(1.) Air attack against the civilian population shall be absolutely prohibited;

(2.) The High Contracting Parties shall agree as between themselves that all bombardment from the air shall be abolished, subject to agreement with regard to measures to be adopted for the purpose of rendering effective the observance of this rule.

These measures should include the following:

(a) There shall be effected a limitation by number and a restriction by characteristics of military aircraft;

(b) Civil aircraft shall be submitted to regulation and full publicity. Further, civil aircraft not conforming to the specified limitations shall be subjected to an international regime (except for certain regions where such a regime is not suitable) such as to prevent effectively the misuse of such civil aircraft.

In the year 1933 discussions on the various proposals continued. On March 16 the British government submitted a Draft Convention providing for abolition of bombing from the air (except for police purposes in outlying regions): abolition of military and naval aircraft, if supervision of civil aviation could be worked out to prevent its misuse for military purposes, or, failing this, a reduction of approximately fifty per cent in the military and naval air forces of the world. The United States, Canada, Argentine and Japan stated on April 3 that they would agree to a measure of national control and publicity for their civil aviation, provided some regulations were generally accepted. President Roosevelt proposed on May 16 complete elimination of offensive measures, recommending that no nation increase its armaments, and suggesting a pact of non-aggression. On May 17 the German Chancellor stated that Germany desired equality of status by the progressive disarmament of other countries.

Germany left the Disarmament Conference in October 1933. In January, 1934, the British government sent a memorandum expressing the opinion that it would be prejudicial to the prospects of the success of the Permanent Disarmament Commission that any

country not hitherto entitled to possess military aircraft should acquire them, and suggesting that Germany, Austria, Bulgaria and Hungary should be asked to waive claim to equality for two years. Further work was done in 1934 and 1935, but is omitted in this abbreviated account of the Disarmament Conference which has not since been re-convened.

Inaction resulting from the Disarmament Conference led to the plan of a Western European Air Pact in February, 1935, designed to deal with sudden unprovoked aggression from the air. Great Britain and France proposed the Pact to Italy, Belgium and Germany. The plan retains national air forces and would therefore, it has been stated, assist in re-armament rather than in disarmament.

(d) Sanctions: International Air Police. The following comments are noted:⁹

"The proposed [Anglo-French] Air Pact is a promise, if one centre of European culture be attacked, to attack another. Apart from one's natural doubts about so barbarous a method, there is the real possibility that we may quiet our fears of air bombardment with false hopes of security. From those fears we should not, we must not, rest until we have achieved true collective security, and that can only come with the abolition of national air forces and the creation of an international air police. * * *

"The efforts to arrange disarmament have not been unfettered; they have been limited by a very important condition—national security. The security of nations is today, as it always has been, estimated in terms of national armaments, so that in the sphere of armaments the first duty of any national government is not to disarm, but to guarantee its national security. No particular weapon exists today which some state does not regard as vital to its national security, and upon the reduction or limitation of which it is therefore not prepared to agree. In short, disarmament will only become possible when we have shifted the onus of guaranteeing national security from a national to an international authority.

"This is the significance of the many proposals which are being made today for an international police force, especially for such a force in the air . . .

"Nevertheless, the moment that this topic is discussed it is subject to two fundamental misapprehensions, one of which is that an international police force would have to be a mammoth affair capable of defeating the present national armed forces. That is palpably ridiculous. You cannot police a world heavily armed with the weapons of the police. The very suggestion of international police postulates the disarmament of national forces in any element which is to be policed internationally.

"The other misconception is more widely held and is responsible for much of the current opposition to the idea of international air police. Nor

9. *Karlin M. Capper-Johnson*, "The Proposed Anglo-French Air Pact and the Problem of Collective Security," 1 *The New Commonwealth Quarterly* 53, 49-51 (1935).

can the exponents of an international air police force be wholly exonerated from blame for having failed to make the position clear. A number of persons who admit the need for collective security proceed to advocate an international police force after the pattern of the armed forces which policed the Saar during the plebiscite. They entirely omit to observe that, although the purpose of that force was police, it did not properly constitute an international police force, for in the last resort the troops were under the control of their respective national authorities, any one of which could not only have refused to countenance their participation in the enterprise, but could have withdrawn them . . .

"Moreover, such a system of mutual assistance has been in existence both under Article XVI of the Covenant [of the League] and under the Locarno Treaty, and both schemes have, as yet, failed rather conspicuously. They have failed to guarantee national security through promises of mutual assistance . . . It is due to lack of certainty in the effective operation of the various plans, owing to their dependence upon national authorities.

"An international air police must be recruited individually—with limits to the numbers of any one nationality—of men whose allegiance is to an international authority"

A Summary of Suggested Principles and Tentative Recommendations for an International Air Police Force has condensed much of the information on the subject as follows:¹⁰

I. General Principles.

(1.) The use of force in international relationships should be limited to the police function, *i.e.*, protection against violence and the enforcement of international law.

(2.) This conception of the right use of force involves the establishment or development of an International Authority empowered to settle all disputes, and to organise diplomatic, financial, economic and policing sanctions.

(3.) In order to provide for the pacific settlement of all disputes, and for the security of all its States-members, the International Authority should be equipped with at least two institutions:

- (a) a Tribunal in equity; and
- (b) an International Police Force.

(4.) In order that the League of Nations should be developed into an International Authority, it should possess both these institutions as part of its permanent organization.

(5.) That for the present, and until the United States, Russia, or Japan have individually or collectively become members of the League, the organization of the International Tribunal and Police Force shall be undertaken by its European States-members.

(6.) It follows:—

- (a) That in its embryonic stage the International Authority will

10. A Summary of Suggested Principles and Tentative Recommendations for an International Air Police Force, Its Functions and Organization, (1934) London, The New Commonwealth Society.

be constituted within the framework of the League, and that its membership may be confined to European States-members.

(b) That, during this period, the International Police Force shall function as the instrument of the International Authority for the maintenance of law and order in Europe and for the protection of the dependencies of its States-members situated in other parts of the world;

(c) That, as the membership of the Authority is expanded by the inclusion of the United States, Russia and Japan, the International Police Force will be developed into a world policing agency.

(7.) The International Police Force should be founded upon the principle of differentiation of weapons. This may involve eventually the transference of all new and super-weapons invented or employed during the last twenty-five years—such as aeroplanes, submarines, tanks, poison gas, the newer types of naval craft and artillery—and any other weapons which may hereafter be invented, to the custody and control of the International Authority.

(8.) In pursuance of this policy, the creation of an International Air Police Force (I.A.P.) is considered to be the most urgent problem, and provides the most effective means of initiating a plan of international sanctions.

(9.) The control of the I.A.P. should be vested in the Executive Organ of the Authority.

II. Functions.

(1.) The functions of the I.A.P. are twofold:—

(a) Protection against aggression on the part of a member or non-member State. In the event of aggression (to be defined by the International Authority), the I.A.P. acts as a reinforcing agency, and is sent to the assistance of the victim of aggression. Its primary duty will be to compel the appearance of the aggressor before the international tribunal, and to assist the national defensive forces in repelling an invasion or terminating hostile occupation of its territories.

(b) To act when necessary as an instrument for the enforcement of the decisions of the Authority—the awards of the Tribunal and the verdicts of the Permanent Court—by making effective the diplomatic, financial and economic sanctions provided for in Article XVI of the Covenant.

The Summary is completed under the headings of Policing Regulations, Maintenance, Method of Establishment, Recruitment and Enlistment, Location, Organization and Administration, Command, Supplies and Replacement, Supervision and Control, Strength, Civil Aviation; and a Memorandum follows giving details of the plan.

It is interesting to refer to a Joint Resolution of the Congress of the United States in the year 1910¹¹ authorizing the President

11. June 25, 1910. 36 U. S. Statutes at Large, Part I, p. 885; Congressional Record of the United States, 61st Congress, 2nd Session, June 20, 1910, Vol. 45, Part VIII, p. 8545.

to appoint a commission to consider the expediency of utilizing existing international agencies for the purpose of limiting the armaments of the nations of the world by international agreement, and of constituting the combined navies of the world an international force for the preservation of universal peace, and to consider and report upon any other means to diminish the expenditures of government for military purposes and to lessen the probabilities of war. An earlier reference to international police is found in the Presidential Message of Theodore Roosevelt, December, 1904,¹² in which he advocates "substitutes for war, which tend to render nations in their action toward one another and indeed toward their own peoples, more responsive to the general sentiment of humane and civilized mankind, and, on the other hand, that it should be prepared, while scrupulously avoiding wrongdoing itself, to repel any wrong, and in exceptional cases to take action which in a more advanced stage of international relations would come under the head of the international police." In an address before the Nobel Prize Committee in May, 1910,¹³ he said, "It would be a master stroke if those great powers honestly bent on peace would form a League of Peace, not only to keep peace among themselves, but to prevent, by force if necessary, its being broken by others. The supreme difficulty in connection with developing the peace work of The Hague arises from the lack of an executive power, of any police power to enforce the decrees of the court."

Among opponents of the use of force against an erring nation is a peace society which takes the following stand:¹⁴

"... there are but two ways to coerce a State, one by arms which is war, the other by law which is peace; that the sole function of the sanction of force in a civilized society is limited to cases involving individuals only. This brief and seemingly simple statement, however, appears very difficult to understand, and, if understood, to accept.

"By way of introduction let it be said that the attitude of the American Peace Society is founded upon its belief that no greater contribution has ever been made toward the maintenance of peace between States than the Union of forty-eight free, sovereign, independent States known as the United States of America.

"In support of this view the following facts appear to be pertinent: first,

12. Congressional Record of the United States, 58th Congress, 3rd Session, December 6, 1904, Vol. 45, Part I, p. 19; Reprinted in "A Compilation of the Messages and Papers of the Presidents, (New York, Bureau of National Literature, Inc.) Vol. XIV, p. 6923; Reprinted in "War Obliterated by an International Police," The Hague, Martinus Nijhoff (1915) p. 148.

13. "War Obliterated by an International Police," *supra*, p. 149.

14. Arthur Deerin Call, "Force and World Peace," 99 World Affairs 117 (1936).

For views of peace organizations, see literature issued by the American Peace Society, the Society of Friends, League of Nations Union, National Council for Prevention of War, World Peace Foundation, and others.

the United States Supreme Court can and does exercise no sanctions of force in its decisions of cases between States; second, the Supreme Court of the United States does not exercise its authority even against an official of a State when such official has failed to act in accord with the Constitution of the United States. If a state official attempts to enforce an unconstitutional statute he is performing an illegal act for which he is personally responsible, in consequence of which the Supreme Court of the United States may of course enjoin him, but such a proceeding is not considered to be an injunction against the State; third, the Supreme Court of the United States does not compel even by the process of a writ of command, known in the law as a mandamus, the performance of his duty by a state official, for the Court appears to be loath to issue a mandamus against a State; fourth, no judgment of the Supreme Court of the United States has ever been executed by force against any State of the American Union; fifth, while in the early days decisions by the Supreme Court of the United States¹⁵ in issues between States were not always obeyed, such decisions are now accepted by mutual consent as final; sixth, authority to define and to punish individuals offending the law of nations is in the case of our country expressly delegated to the Congress, a body that demands due diligence in the obedience by its citizens to international law . . .

"The people of the United States have evidently found it repugnant to their views that their country should become a member of any international organization that possesses or claims the power to make, to judge, and if it sees fit to execute by force of arms its laws against a nation. The people of America believe that the framers of their Constitution planned and the interpreters of that instrument since have come to consider that the Supreme Court of the United States should have no arms enforcing power over the States . . .

"Nothing appears to bear more directly upon the fact that any military coercion of a State is war than the history of the discussions upon this very point in the Federal Convention of 1787. In that Convention the plan to establish a government with power to coerce a State by arms, as will be seen, was proposed, discussed, and unanimously eliminated.

"From the records it appears that the sixth resolution of the Virginia plan, which became the basis of our Constitution, contained at the outset a combination of what we now know as Articles X and XVI of the Covenant of Geneva's League, for it proposed to vest its National Legislature with the right 'to call forth the forces of the Union against any member of the Union failing to fulfill its duty under the articles thereof.' This plan was laid before the Congress on May 29, 1787. The next day, according to Mr. Madison's notes, Mr. George Mason of Virginia—

'observed that the present confederation was not only deficient in not providing for coercion & punishment agst. delinquent States; but argued very cogently that *punishment could not in the nature of things be executed on the States collectively*, and therefore that such a Govt. was necessary as could directly operate on *individuals*, and would punish those only whose guilt required it.'

15. The leading case on these points is *Kentucky v. Dennison*, 24 Howard 66, decided in 1860 [December Term] where the Court held that there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel, say, the governor of a State (in that case Ohio) to discharge his duty. [Footnote in the original.]

"In the session of June 20, Mr. Mason said further:

'It was acknowledged by Mr. Patterson that his plan could not be enforced without military coercion. Does he consider the force of this concession? *The most jarring elements of nature; fire & water themselves are not more incompatible than (than) such a mixture of civil liberty and military execution.* Will the militia march from one State to another, in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the citizens of the invaded State assist one another till they rise as one Man, and shake off the Union altogether. Rebellion is the only case in which the military force of the State can be properly exerted agst. its Citizens.'

"In the session of May 31, as reported by Mr. Madison, 'The last clause of resolution 6, authorizing an exertion of the force of the whole against a delinquent State, came next into consideration.' Upon this 'Mr. Madison,' to quote his exact language:

'observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. . . . A Union of the States containing such an ingredient seemed to provide for its own destruction. *The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment,* and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this recourse unnecessary, and moved that the clause be postponed. This motion was agreed to *nem. con.*'

"Thus, as already said, the whole scheme for a league to enforce peace was considered by those gentlemen at Philadelphia and overruled unanimously. When the matter came up again on June 8, 1787, Mr. Madison asked how the national resources could be exerted to enforce a national decree, say, against Massachusetts aided perhaps by a number of her neighbors. 'It would not be possible,' he said. A small group of States 'might at any time bid defiance to the national authority.' Mr. Madison came definitely to hold that any scheme of a Union of States with power to use force even against the unconstitutional proceedings of one of the States was both 'visionary & fallacious.'

"When the question of coercion was again considered in the session of July 14, Mr. Madison called for a single instance in which the general government was not to operate on the people individually, and announced to the Convention that '*the practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.*'

"In a letter to Thomas Jefferson, under date of October 24, 1787, the Convention having adjourned, Mr. Madison said:

'A *voluntary* observance of the federal law by all the members could never be hoped for. A *compulsive* one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent & the guilty, the necessity of a military force both obnoxious & dangerous, and in general a scene resembling much more a civil war than the administration of a regular Government.

'Hence was embraced the alternative of a Government, which instead of operating on the States, should operate without their intervention on the *individuals* composing them.'

"Alexander Hamilton, known to his colleagues as 'Colonel' Hamilton,

took occasion, on June 18, 1787, to say something to the Federal Convention about the use of force against a State. He said:

'Force, by which may be understood a coercion of laws or coercion of arms A certain portion of military force is absolutely necessary in large communities But how can this force be exerted on the States collectively? It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue.' . . .

"Oliver Ellsworth of Connecticut, a member of the Federal Convention, later Chief Justice of the Supreme Court of the United States . . . said:

' . . . Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. . . . I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, States, in their political capacity. No coercion is applicable to such bodies, but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State, it would involve the good and bad, the innocent and guilty, in the same calamity.

'But this legal coercion singles out the guilty individual, and punishes him for breaking the laws of the Union. All men will see the reasonableness of this; they will acquiesce, and say, Let the guilty suffer.' . . .

"When, as in the leading case of Virginia vs. West Virginia, the whole question of the power of the Supreme Court to enforce its decrees against a State has become acute, the record clearly shows that every judgment of the Court has been satisfied and all questions of coercion dismissed without even the threat of force. In short, here in America we have a Union of States that has finally banished all thought of war between the States, or between any of the States and the Union itself. Coercion, force, does indeed play its part in the maintenance of public order by operating under the law, let it be repeated, upon individuals only, and not against States. The success of the plan, of course, has been due to the fact that the system is founded not upon any magical organization but upon laws that express the general will of the people. William Ladd¹⁶ found that:

'compacts are guaranteed by religion, public opinion, and certain undefined laws of honor dependent on them; but most of all by a general perception of the truth, that the happiness of the whole is best promoted by the subservience of the interests of the few to the interests of the many. . . . It would not comport with the peace and happiness of mankind, to invest rulers with the power to compel an acquiescence in the decision of a Court of Nations by arms; but if we look into the condition of man in a state of civilization, it will be found, that where one man obeys the laws of fear of the sword of the magistrate, an hundred obey them through fear of public opinion. . . . As it is not intended that this Court of Nations shall judge any cases but such as are submitted to it by the mutual consent of both parties concerned, its decisions will have as much to enforce them as the decisions of an individual umpire, which has so often settled disputes between nations.'

16. Founder of American Peace Society, organized May, 1828. William Ladd, An Essay on a Congress of Nations, [Original Edition, 1840] Carnegie Endowment for International Peace (1916).

"So there is no reason for concluding that because the sanctions of force have failed at Geneva there is nothing left for the States except to resign themselves to Armageddon. On the contrary the call is for a closer union of the nations with the purpose of substituting justice for force . . .

WHAT LAW GOVERNS?

"Any Society of Nations therefore may well begin by recognizing that there are rules or usages which civilized States have come to agree as binding upon them in their dealings with each other, and that the sum of such rules and customs is international law. Outside the realm of the consular and diplomatic services, there are sound reasons for an international organization to study, to modify and to improve these rules or usages. Such proceedings would end in agreements, which agreements would take the form of treaties, which treaties would express the laws binding upon individuals and nations. . . .

" . . . authority to punish offenses against the law of nations in [the] case of the United States is expressly delegated by Article I, Section 8, of its Constitution, to the Congress, and (that) the Congress demands due diligence on the part of its citizens to obey international law. James Brown Scott, writing in the *Georgetown Law Journal*, Volume XXI No. 2, January 1934, said in this connection: 'If, by the constitutional law of the State, an act of the legislative body be required in order to carry out the rule of international law, then it is the duty of the nation in question to pass such a municipal statute, and if it does not pass such a municipal statute, it is liable,' as in the case of the Alabama Claims, 'for damages to the nation or to the individual who may have suffered by its failure to do so.' It is in this way that the sanction of force comes to operate in defense of international law without the devastations of war. There is no other way. As admitted by certain authorities, every rule of the law of nations has *in esse* or *in posse* a municipal sanction. The operation of the sanctions of force in defense of international law will naturally, indeed must inevitably be confined within the respective States if war between States is to be avoided. International law is law for all the nations. It is therefore the duty of each nation to provide within its own statutes for proper remedies in case its citizens breach the rules of international law. . . .

"Thus there is in any promising plan for the maintenance of peace between nations a place for the exercise of force. That place lies within the States themselves, the States acting under their own laws upon their own individuals in behalf of the law of nations"

To recount the development of international law as applied to aviation imposes too much upon the author and readers of this brief article, but there is place for recalling a fundamental principle at the basis of all law. Rules regulating human behavior express needs and aims arising from a higher than human source. Periods in history have evolved types of law adapted to the growth of civilization.

In illustration of this, art and music have given us "The Scale

of the Law and Its Harmonies."¹⁷ In this conception the great divisions of the law are symbolized as notes of a musical octave. The keynote is Divine Law. The octave is composed of:

Divine Law: Love and Wisdom.

Law of Nature: The Golden Age.

Revealed Law: Greek Themis, Hebrew Decalogue, Christian Beatitudes.

Law of Reason: Code of Justinian; Penn, The Lawgiver.

Common Law: Blackstone.

Law of Nations: Supreme Courts of the States and Nation.

International Law: Supreme World Court; Disarmament.

Divine Law: Love and Wisdom in ascending overtones.

"The Spirit of the Law" is pictured as the two-fold one of purification and enlightenment. The streams of the law, running throughout all ages, purified by wisdom, meet in a sea of light—the Divine Law.

Aviation, as a late and inherently international addition to civilization, has tuned in at the upper notes of the scale. Aviation is necessarily subject to national law for safety of persons and protection of property; it is essentially international in its submission to the collective law of nations; but it uniquely transcends both in its flight beyond the limits of political foresight. In a word, aviation epitomizes universal law.

THE COMMON GOOD

The majority of people in the world today undoubtedly desire peace, but they differ as to methods of attaining it. Governments have chiefly focused attention upon international justice, disarmament, security and sanctions. Most of the solutions, reflecting a psychology of fear which places nations and their citizens upon the defensive, are in two main categories. One comprises international action through cooperation of sovereign states, and the other voluntary submission of states to control or supervision by an international authority. Concrete suggestions have included the development of international law, revision of treaties, and an international court of equity; abolition or reduction of armaments; internationalization or control of civil aircraft to prevent misuse for war purposes; an international police force. Details vary according to whether emphasis is placed upon nations as entities, as members of

17. *Violet Oakley, Law Triumphant: The Opening of the Book of Law, With Plates of Mural Paintings in the Supreme Court of the Commonwealth of Pennsylvania*, (Philadelphia: Biddle-Deemer Co., Limited Edition, 1932).

a group or upon an international authority; combinations of land, sea and air powers, also technical, geographical and other considerations.

Adjustments could, very probably, be made in the administrative, technical and legal phases, if the solutions are based upon sound principles. In international organization, for example, in European air transport, the difficulties are apparently far more often of a political than of a technical or legal nature.¹⁸

Many obstacles to collective action have arisen from political complications, notably in the Disarmament Conference. In the League of Nations much of the excellent work along scientific, intellectual and various non-political lines is overshadowed by the injection of controversies of a political nature. Hence, the need for a more understanding and practical application of political science to international relations. The roles played by democracy, facism, communism and other systems, together with their economic and social aspects, affect plans for world-wide aeronautics. Motives underlying proposals for international legislative, judicial and administrative bodies need examination, as well as principles of co-operation, collective action, control and supervision; original and appellate jurisdiction for international courts; mandatory, discretionary and advisory functions of executives; official and non-official representation; and many more points, including the effectiveness of the C.I.N.A. and C.I.T.E.J.A.

The political framework of the United States of America, if serving as a guide toward a plan for uniting the family of nations, may require adaptations to meet world conditions. Likewise, the United States does well to be cautious in following plans primarily devised for the protection of Europe. Each has much to learn from the other, and neither can disregard the Orient.

The above problems and others, such as the suggestion that internationally strategic points in the world, like the Suez Canal, Gibraltar, Panama Canal and the Dardanelles be given to international control, concern the United States.

The traditional and conservative attitude of the United States in such a subject as the proposed internationalization of aircraft is to regard it as a regional—that is, European matter, and to refrain from sending abroad any suggestions; but the United States has expressed an interest in possible cooperation with respect to super-

18. *Laurence C. Tombs, International Organization in European Air Transport (1935), pp. 66-69, 200.*

vision of aviation.¹⁹ As to the control or supervision of the manufacture of and traffic in arms, the United States appears willing to discuss such a proposition.²⁰ Domestic supervision is its present policy in maintaining a neutral stand toward belligerents. Neutrality legislation was recently extended by the Congress²¹ to include civil war in Spain, thereby no longer leaving individual exporters of aircraft and supplies free to act when moral suasion fails. Important discussion hinged upon discretionary powers of the President. The condition of aeronautics, both civil and military, in the United States as shown in legislation and five official reports, with conclusions of policy and recommendations to the Congress, have been recently summarized.²² An earlier article discusses commitments of the United States on international aerial navigation.²³

Briefly, on the technical side, convertibility of civil aircraft into more or less effective machines for war has been generally conceded and has helped support a demand for internationalization of civil aircraft to prevent misuse in case military and naval aircraft are abolished. Experts agree that there is no adequate defense for the mass of populations against air attack, with the dropping of bombs and men, and the spreading of poison gas. New inventions may increase the horror. Nevertheless, it would seem inadvisable to suppress invention and stifle growth of the aviation industry. Is it not better to turn invention toward civilian ends? It has been argued, moreover, that supervision is the negative and preventing action, while internationalization is the positive and organizing one; that an international authority does not mean domination by it, but a partial surrender of sovereignty by the states; in other words, that there could be control without occupation of territory and without loss of prestige.²⁴ Could the United States ever subscribe to this?

19. Preliminary Report on the Work of the Conference for the Reduction and Limitation of Armaments, *supra*, *re* regional character, p. 86, par. 3; *re* supervision of aviation in connection with reduction of air armaments, pp. 66, 88, 90, 92, 96, 97, 134, 136, 181-186. See Minutes of the General Commission of the Conference, Series B, Vol. II, IX Disarmament IX, 10.1933, 61st Meeting, 416, 475, 583, for notes that the United States believed a system of adequate supervision should be formulated to ensure the effective and faithful carrying out of any measures of disarmament, that it was prepared to assist in this formulation and to participate in this supervision, and that it was in sympathy with the idea that means of effective, automatic and continuous supervision should be found whereby nations would be able to rest assured that, as long as they respected their obligations with regard to armaments, the corresponding obligations of their neighbors would be carried out.

20. Preliminary Report on the Work of the Conference for the Reduction and Limitation of Armaments, *supra*, pp. 115 (footnote 3, par. 2), 118, 120, 122, 123 (footnote 2), 127, 128, 137.

21. Public Resolution No. 1, 75th Congress, 1st Session, approved January 8, 1937.

22. Fred D. Fagg, Jr., "National Transportation Policy and Aviation," 7 JOURNAL OF AIR LAW 155 (1936). See also Reports of the Department of Commerce, Washington.

23. William M. Gibson, "United States Commitments on International Aerial Navigation," 4 Revue Aéronautique Internationale 69 (1934).

24. Philip S. Mumford, Humanity, Air Power and War, *supra*, p. 158, quoting from Salvador de Madariaga. Minutes of the General Commission, Series B, Vol. II, IX, Disarmament 1933. IX. 10. p. 534.

An international air police force would not greatly interfere with national sovereignty, it is maintained, because air weapons, though destructive, are powerless to achieve permanent political power without consolidation by ground forces, for it is the ground services which would preserve national sovereignty—or what would be left of it. However, if the power of coercion against an offending nation were transferred from national responsibility or from collective action by nations to an international police force, there would still be invoked, albeit indirectly, the principle to which the government of the United States has objected in Articles X and XVI of the Covenant of the League of Nations, namely, the ultimate obligation to use force against other governments.

Disarmament in itself is not a solution, but would be cancellation of a destructive use and thus bring the situation back to a starting point for constructive action—universal service for the common good. Aircraft are uniquely designed for navigation in the air, beyond natural boundaries, with auxiliary locomotion on land and sea. This brings forth new concepts which include the benefits of national and international organization. It is easier to arrive at a practicable solution, if the mind first thinks of space as universal—a medium open to the common use of nations, international groups and individuals under agreements for the protection of all concerned, and for reasonable restraint of individual delinquents.

The ethics of helping the weak will find expression when standards are raised and concerted steps taken toward constructive peace, when enough people think first of preparedness and defense in terms of relationships rather than of armaments. Geographical isolation is no longer secured by design of nature. The kind of isolation within power of man is that which leaves leaders with no followers of destructive orders. Aeronautics as a science cannot be separated from world relationships, but is indeed a pivot for the fate of civilization.

Solutions of world problems must be in tune with the keynote of the universe. Individual responsibility in accord with divine law brings peace within. When nations as well as individuals achieve internal peace, they will find harmony with each other. Legal, political and economic plans, no matter how excellent, are not enough. As President Roosevelt, on addressing the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires, December 1, 1936, said, “. . . Finally, in expressing our faith of the western world, let us affirm that we maintain and defend the democratic form of constitutional representative government . . .

But this faith of the western world will not be complete if we fail to affirm our faith in God. . . . Periodic attempts to deny God have always come and will always come to naught. . . . The faith of the Americas, therefore, lies in the spirit. . . . In that faith and spirit we will have peace"

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